In The

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-989

JOHN E. JONES,
Petitioner,

vs.

CITY OF MEMPHIS, TENNESSEE,
and JOHN DOES,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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TABLE OF CONTENTS

TABLE OF CASES

TABLE OF AUTHORITIES

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RESPONDENTS' RESTATEMENT OF THE QUESTION PRESENTED

1. Whether a municipality can be held liable for the misconduct of its employees under the doctrine of *respondeat superior* in a civil rights action brought directly under the Fourteenth Amendment and the general federal question statute, 28 U.S.C. §1331?

ARGUMENT IN OPPOSITION TO REASONS FOR GRANTING THE WRIT OF CERTIORARI

Between the time that the District Judge ruled on the question now before this Court and the Court of Appeals for the Sixth Circuit ruled on the same question, this Court rendered an opinion in the case of *Monell* v. *Department of Social Services of City of New York*, 436 U.S. 638, 98 S.Ct. 2018, 56 L.Ed.2d 618 (1978), thereby reversing in part the decision of the Court in *Monroe* v. *Pape*, 365 U.S. 167, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961). In *Monell, supra*, this Court held that municipalities were "persons" subject to suit under 42 U.S.C. §1983; however, it also held that "a municipality cannot be held liable *solely* because it employs a tortfeasor—or, in other words, a municipality cannot be held liable under §1983 on a *respondeat superior* theory." 98 S.Ct. at 2036 (Court's emphasis).

The Sixth Circuit subsequently held that the rationale of *Monell, supra*, was conclusive on the issue of whether *respondeat superior* could be applied to fix liability on a municipality under the Fourteenth Amendment. It held that to allow the doctrine to be invoked under the Fourteenth Amendment, when it had no application under 42 U.S.C. §1983 would be incongruous. (26a)

Petitioner relies in part on a supposed conflict between the Sixth Circuit and the District of Columbia Circuit as a basis for this Court to grant the writ of certiorari. It should be noted, however, that the decision in *Dellums* v. *Powell*, 566 F.2d 216 (D.C. Cir. 1977) was rendered prior to this Court's decision in *Monell, supra*. Whether the *Dellums, supra*, court would rule the same way today is a matter of speculation subject to considerable doubt.

For example, the decision in *Dellums, supra*, not to apply §1983 principles to a *Bivens* style action was based

in part on the fact that the provisions of §1983 were not applicable to officers of the District of Columbia. 566 F.2d at 224. At the time the decision was written, the same was true of municipalities by virtue of *Monroe*. The *Dellums, supra*, court, therefore, did not take note of the legislative history of §1983. In light of this Court's reversal of *Monroe* on the issue of municipalities' liability under §1983, certainly that legislative history becomes relevant with respect to those governmental entities, while it would, perhaps, remain irrelevant to a consideration of actions in the D. C. Circuit, where officers' actions may still be shielded from §1983 liability.

It should also be noted that *Dellums, supra*, is not a case involving alleged violations of the Fourteenth Amendment, but rather of the First and Eighth Amendments. One must remember the closeness in time between the passage of the Fourteenth Amendment and Section 1 of the Civil Rights Act of 1871 (the predecessor of §1983). The symbiotic relationship between the two laws is expressed in *Monell, supra*, when this Court recognized that ". . . §1 of the Civil Rights Act simply conferred jurisdiction on the federal courts to enforce §1 of the Fourteenth Amendment. . ." 98 S.Ct. at 2031. Section 1983 represents the intent of Congress to carry out its power under Section 5 of the Fourteenth Amendment "to enforce, by appropriate legislation, the provisions of this [the Fourteenth Amendment] article."

In *Lynch* v. *Household Finance Corporation*, 405 U.S. 538, 92 S.Ct. 1113 (1972), this Court stated that:

> "Not only was §1 of the 1871 Act derived from §2 of the 1866 Act but the 1871 Act was passed for the express purpose of 'enforc[ing] the provisions of the Fourteenth Amendment'." 92 S.Ct. at 1118.

To allow recovery based on vicarious liability under the amendment, but not based on the statute enacted to enforce its provisions, would create an inexplicable paradox.

Division of opinion on the issue of *respondeat superior* liability among district courts, as cited by petitioner, is not adequate grounds for granting of the writ, and would place a formidable burden on this Court, if every such division mandated granting of the writ. Moreover, like the *Dellums* case, *supra*, all of the district court cases cited by petitioner are pre-*Monell* cases.

The only other circuit courts to rule expressly on the issue at bar ruled like the Sixth Circuit. In *Turpin* v. *Maillet*, 579 F.2d 152 (2nd Cir. *en banc* 1978) [judg. vacated and remanded for reconsideration, in light of *Monell*, 436 U.S. 658 (1978)], the Court, *en banc*, pointed out that "some courts have concluded that municipalities should be held liable for any constitutional violation committed by an employee in the course of his employment, even if not sanctioned by a policy-making entity." 579 F.2d at 166.

The Court rejected that determination because it is fundamentally inconsistent with the import of *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971), in that the intendment of *Bivens* is "that those directly responsible for unconstitutional behavior may be called to task for their wrongful acts." 579 F.2d at 164 and 166.

In *Turpin, supra*, the Court refused to grant an additional remedy for a single constitutional violation. Taking *Bivens, supra*, as its touchstone, the Court expressly rejected the notion that vicarious liability was a proper form of relief against a municipality, in noting that:

> ". . . Since the *sine qua non of Bivens* is the imposition of liability upon those actors who can meaningfully be termed 'culpable,' it is inappropriate to permit a recovery of damages from those who, by any standard, are innocent of wrongdoing. Courts should only create a cause of action where none exists or the need for one is demonstrated. We cannot, accordingly, ignore the fact that Congress has provided a primary remedy under §1983 against the employees themselves, and has chosen not to impose vicarious liability upon the municipality." 579 F.2d at 166.

Also in *Molina* v. *Richardson*, 578 F.2d 846 (9th Cir. 1978) (Pet. for cert. filed 10/19/78 as No. 78-665), the Court declined to follow the reasoning that a *Bivens* style action under the Fourteenth Amendment could be used to supply the *respondeat superior* liability against a municipality that §1983 does not provide according to *Monell*.

The Court in *Molina, supra*, correctly concluded that a cause of action was not constitutionally required by *Bivens* to lie against the city. Moving to the question of whether the Court should grant such a remedy, the Court found the creation of such a federal judicial remedy would be inappropriate. This decision was based on several "special factors counselling hesitation" including, respect for the proper role of Congress, which has deliberately chosen to exclude vicarious liability against municipalities from the scope of §1983.

It also included concerns of federalism and the adequacy of §1983 in light of *Monell* as adequate factors suggesting judicial deference.

As the Court noted:

> "We find it significant that *Bivens* simply does not assist as a logical springboard for the extension suggested. There, the recovery was against the individual federal officers involved, and not against their 'deep-

pocketed' employer, the United States. Thus, the true analogue to *Bivens* liability for wrongs committed by agents of a municipality is precisely that provided by section 1983." 578 F.2d at 853.

Petitioners contend that this Court need not pay heed to the doctrine of *in pari materia*, though they never offer a reason for not recognizing this well-established rule of construction, that promotes harmony and uniformity among laws. While they label the results of the doctrine as "restrictive" (petitioner's brief, p. 12), it must be noted that those results are also "consistent" with legislative enactments already governing the area. See, *Cort* v. *Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975).

Like the language in §1983, the language of the Fourteenth Amendment "cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer-employee relationship with a tortfeasor." *Monell, supra*, 98 S.Ct. at 2036. Under the Amendment the State is forbidden to act in such a way as to "deprive" any person of life, liberty, or property without due process of law. It is only by a government's laws, policies or customs that it, as a legal entity, acts to give, receive, or deprive its citizens of these things.

This Court in *Monell, supra*, pointed out that Representative Bingham in drafting Section 1 of the Fourteenth Amendment had in mind redress for actions like the taking of private property for public use without compensation by a city. 98 S.Ct. at 2034. Such an act would involve direct action by the city in the form of the execution of government policy. By contrast, when an individual at the lowest levels of the government hierarchy, directly in opposition to all State law, policy, and custom, acts to deprive another of due process, the fact that he wears a uniform and is employed by the State should not *ipso*

facto cause his misdeeds to constitute a State deprivation and result in the State's liability. In such a case, it cannot be fairly argued that the State has acted unlawfully when the laws, policies, and customs which it stands for, and operates by, render it totally innocent. To hold otherwise is to put the integrity of the State at the mercy of every single individual employed by it who may at some point become arbitrary, capricious, vindictive, or even brutal in his actions towards another.

Petitioner criticizes *Jones* v. *McElroy*, 429 F.Supp. 848 (E.D. Pa. 1977), and *Smetanka* v. *Borough of Ambridge*, 378 F.Supp. 1366 (W.D. Pa. 1974), for not suggesting under what principles a city should be held liable for employee misconduct. The answer to their criticism was provided by this Court in *Monell, supra.*

Petitioner commends the principle of *respondeat superior* as one of "universal application", as characterized by this Court in 1852, but he fails to recognize that in 1978 this Court limited that application in *Monell* with respect to actions based on 42 U.S.C. §1983. (Petitioner's brief, p. 13) Petitioner also asserts that the doctrine is particularly appropriate in cases arising under the Fourteenth Amendment, since the police conduct is a violation only because the individual is clothed with state authority. Yet the same is true of actions based on §1983, which must be under color of state law, and where the principle of *respondeat superior* has now been firmly rejected.

It is true that there are some differences in the remedial coverage furnished by the jurisdictional statute upon which an action under the Fourteenth Amendment [28 U.S.C. §1331] is based and the one upon which an action under §1983 [28 U.S.C. §1343(3)] is based. See *Lynch, supra*, 92 S.Ct. at 1119. When viewed in the context of the liability of a municipality for the tortious con-

duct of its employees, however, their scope becomes binocular. While each statutory provision takes a slightly different view of the object under scrutiny, the resultant image of municipal liability is and must be correctly fused and consistent as seen by each statute.

CONCLUSION

For the above reasons the Writ of Certiorari prayed for by the Petitioner should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have, on this 18th day of January, 1979, forwarded three (3) copies of the foregoing brief to Mr. Jack Greenberg, Suite 2030, 10 Columbus Circle, New York, New York 10019; and Mr. Walter L. Bailey, Tenoke Building, 161 Jefferson, Memphis, Tennessee 38103, by United States Mail, postage prepaid, on the date above shown.

CLIFFORD D. PIERCE, JR.